Workplace Safety and Insurance Appeals Tribunal

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Tribunal d'appel de la sécurité professionnelle et de l'assurance contre les accidents du travail

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Ontario

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Quarterly Production and Activity Report

October 1 to December 31, 2014

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Production Summary

At the end of the fourth quarter 2014, the active inventory totaled 8,838 appeals. This is approximately 19% higher than the active inventory at the end of 2013.

Incoming Appeals

Incoming appeals for Q4-2014 numbered 1,110; of these, 1,045 were appeals from WSIB decisions, and 65 appellants advised they were ready to proceed to hearing following a period of inactive status. In 2014, incoming appeals totaled 5,079. This is a decrease of 13% from total incoming appeals in 2013.

The weekly average of hearing-ready appellants in Q4-2014 is 97. This figure excludes cases reactivated from inactive status, and is a 25% increase from 2013.

Dispositions

Dispositions in the fourth quarter of 2014 totaled 980. This includes 307 dispositions in the pre-hearing areas resulting from dispute-resolution (ADR) efforts, and 673 after-hearing dispositions; of the after-hearing dispositions, 649 followed from Tribunal decisions.

Inactive Inventory

At the end of Q4-2014, the inactive inventory was 2,089 cases. This is a decrease of approximately 11% from the inactive inventory at the end of 2013.

Decisions Released within 120 Days

For the year to date ending Q4-2014, 85% of final decisions were released within 120 days. Comparisons to earlier years can be found in section F: Production Charts.

The Notice of Appeal Process

The Tribunal's Notice of Appeal (NOA) process places responsibility in the hands of the parties and representatives to advance a case, and requires appellants to confirm their readiness to proceed (by filing a Confirmation of Appeal) with their appeals within two years of completing the NOA.

The NOA inventory includes cases that would previously have been closed as inactive by Tribunal intervention. These "dormant" cases are tracked as part of the Tribunal's case management. Many are expected to close as abandoned appeals after a two-year period expires. At the end of the fourth quarter of 2014, the notice inventory included 1,739 dormant cases, the active inventory totaled 8,838 cases, and the inactive inventory totaled 2,089 cases.

Production Tables and Charts

A. Active Inventory End of Quarter

Period	Active Inventory
Q1-2013	6235
Q2-2013	6675
Q3-2013	6966
Q4-2013	7438
Q1-2014	7971
Q2-2014	8395
Q3-2014	8667
Q4-2014	8838

B. Incoming Appeals

Period	Incoming Appeals
Q1-2013	1414
Q2-2013	1566
Q3-2013	1407
Q4-2013	1469
Q1-2014	1369
Q2-2014	1386
Q3-2014	1214
Q4-2014	1110

C. Dispositions

Period	Dispositions – Total	Pre-hearing	After Hearing
Q1-2013	888	280	608
Q2-2013	976	283	693
Q3-2013	937	284	653
Q4-2013	944	305	639
Q1-2014	934	304	630
Q2-2014	993	302	691
Q3-2014	895	266	629
Q4-2014	980	307	673

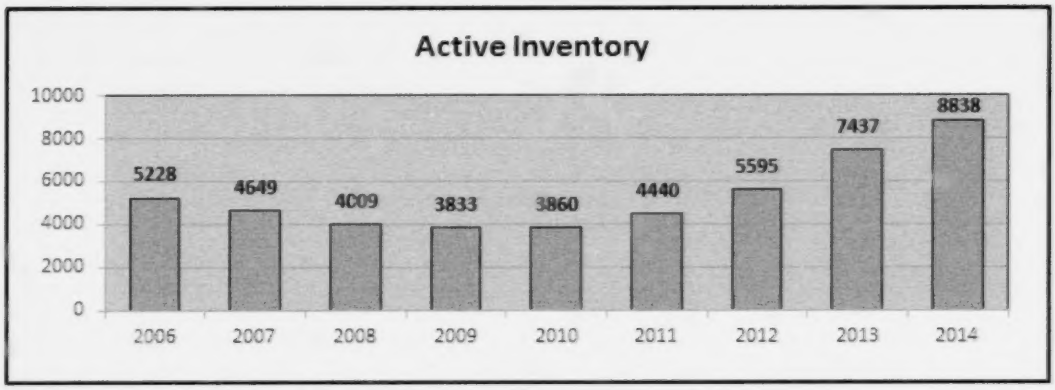
D. Inactive Inventory

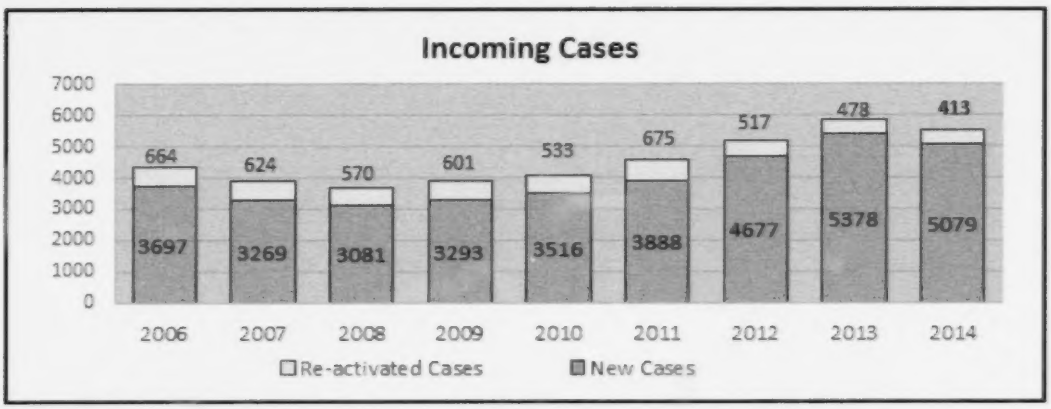
Period	Inactive Inventory
Q1-2013	2473
Q2-2013	2462
Q3-2013	2419
Q4-2013	2338
Q1-2014	2271
Q2-2014	2219
Q3-2014	2147
Q4-2014	2089

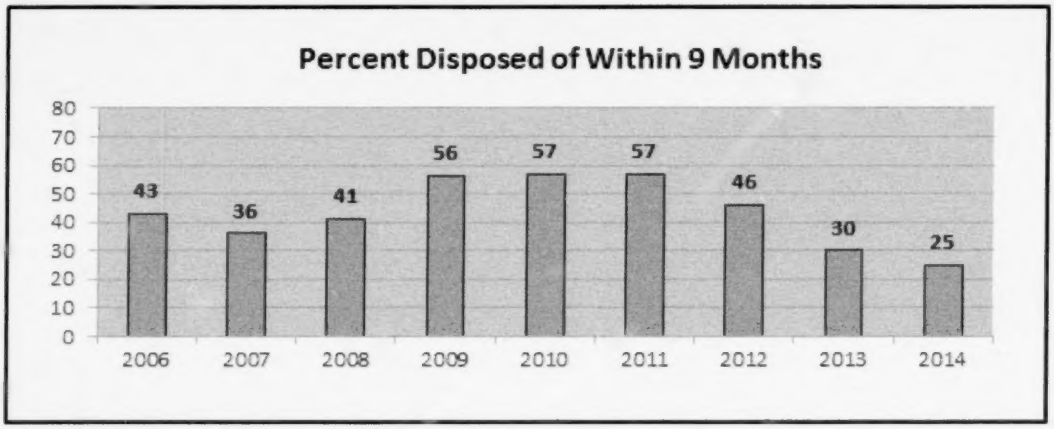
E. Notice of Appeal (Dormant cases)

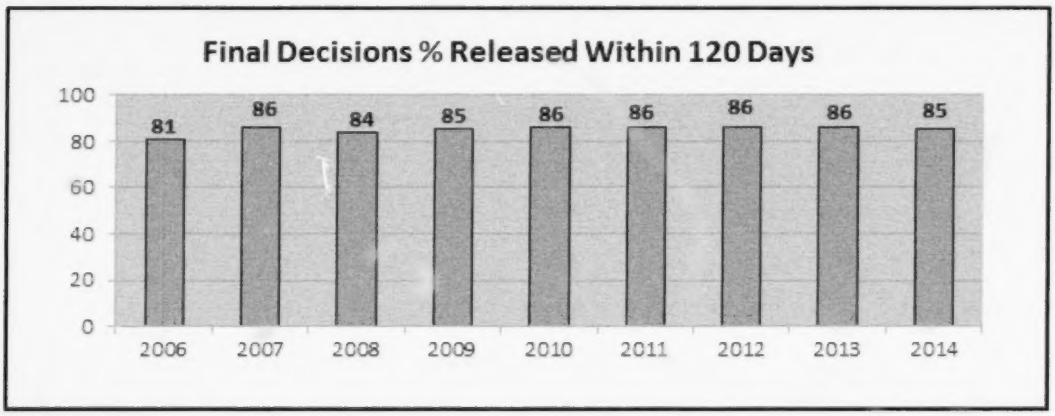
Period	Total Dormant	Change from Previous Quarter
Q1-2013	1479	-116
Q2-2013	1630	151
Q3-2013	1808	178
Q4-2013	1862	54
Q1-2014	1764	-98
Q2-2014	1733	-31
Q3-2014	1780	47
Q4-2014	1739	-41

F. Production Charts: From 2006 to 2014






Percent Disposed of Within 9 Months
80
70
60
50
40
30
20
10
0
43
36
41
56
57
57
46
30
25
2006
2007
2008
2009
2010
2011
2012
2013
2014


Final Decisions % Released Within 120 Days
100
80
60
40
20
0
81
86
84
85
86
86
86
86
85
2006
2007
2008
2009
2010
2011
2012
2013
2014

Judicial Review Activity

The status of applications for judicial review involving the Tribunal for the fourth quarter of 2014 is set out below. Only those judicial reviews where there was some significant activity during the quarter are listed. Most applications for judicial review are handled by General Counsel and the lawyers in the Tribunal Counsel Office.

1. *Decisions Nos. 512/06I* (January 19, 2007), *512*/06 (November 2, 2011) and *512*/06R (December 10, 2013)

This was the first case where a Tribunal decision on the *Canadian Charter of Rights and Freedoms* (Charter) was subject to judicial review.

The worker injured his back in 2001, when he was 63 years of age. The Board paid the worker loss of earnings (LOE) until May 31, 2002, when the worker turned 65, which was also the mandatory retirement date set by the employer.

The worker appealed to the Tribunal for LOE benefits after May 31, 2002 for his back, and also for benefits for a right shoulder injury. In *Decision No. 512/06I*, a single Vice-Chair denied the appeal for the worker's right shoulder, but granted the worker entitlement to LOE benefits from May 31, 2002 until February 5, 2003, (which was two years after the injury) pursuant to s.43(1)(c) of the *Workplace Safety and Insurance Act* (WSIA).

The worker then alleged that limiting entitlement to LOE to two years post-injury for those workers over age 63 contravened s.15(1) of the Charter.

The Ontario Attorney General participated in the Tribunal hearing. The Office of the Worker Adviser (OWA) and the Office of the Employer Adviser (OEA) were invited to participate as interveners. The OWA accepted, and became co-counsel with the worker's representative. The OEA withdrew from the appeal.

The hearing reconvened with a full Panel to consider the Charter issue. In *Decision No. 512/06*, the majority of the Panel found there was no breach of the Charter. The Vice-Chair dissented and found there was a breach of s.15(1) the Charter.

The majority considered the historical context of workers' compensation law, the background to the dual award scheme, and the evidence of expert witnesses. It found the workplace insurance plan operates primarily as an insurance scheme, rather than a social benefits program.

The majority characterized the test for whether the Act violates s.15(1) of the Charter to be (a) if the Act creates a distinction based on an enumerated ground and (b) if there is a distinction, whether it is discriminatory in that it perpetuates disadvantage or stereotyping. The worker alleged there was a discriminatory distinction based on age. The majority agreed that there was a distinction on an enumerated ground, but did not agree that the distinction perpetuated disadvantage or stereotyping.

The majority noted there had been no Charter decision in a Canadian court which had successfully challenged the termination of benefits at age 65. The majority also noted that age 65 is still when most people retire and that it was reasonable for an insurance plan to rely on actuarial probabilities and terminate benefits at age 65 rather than continuing payments for life. The worker himself had not demonstrated that he would

have worked after age 65 or had any expectation of being employed after age 65, and in fact did not work after age 65.

Although the worker was not disadvantaged himself based on age, the majority went on to consider the comparator group as a whole. It noted that almost all workers injured after age 61 return to work, meaning most are not disadvantaged by the two year statutory limit. Further, a two year limit takes into account the life circumstances of those persons in their sixties, as opposed to those in their twenties. Workers at age 65 are eligible for other sources of income, such as the Canadian Pension Plan (CPP). Viewed contextually, the majority found the two year limit does not perpetuate prejudice of workers aged 63 and older. Even if section 43(1)(c) did violate s.15(1) of the Charter, it constituted a reasonable limit under s.1 of the Charter.

In his dissent, the Vice-Chair found that the workplace insurance scheme was both an insurance scheme for employers and a social benefits program for workers. He found that s.43(1)(c) was discriminatory as it failed to consider the disadvantaged position of older workers, and limited their entitlement to benefits they might be entitled to if they had been younger. The Vice-Chair found that s.43(1)(c) was not saved under s.1 of the Charter. The Vice-Chair would have allowed the worker LOE benefits until age 71.

The worker commenced an application for judicial review. After the Tribunal filed its Record, counsel for the worker attempted to submit new evidence for the judicial review. As the respondents objected, counsel for the worker then attempted to commence an application to reconsider *Decision No. 512/06*, while the judicial review was still pending. As the respondents objected to this approach as well, the worker decided to withdraw the judicial review and pursue a further reconsideration at the Tribunal. The respondents consented to the withdrawal, though the Tribunal insisted on payment of costs incurred from producing the Record.

The worker then filed a request for reconsideration of the WSIAT decision. Since the original Tribunal Vice-Chair had passed away, a new Vice-Chair had to be assigned to hear the reconsideration.

The reconsideration was denied in *Decision No. 512/06R*. The new Vice-Chair did not accept the worker's argument that there was substantial new evidence not available at the time of the hearing which would likely have changed the outcome of the decision.

In January 2014, the worker filed a new application for judicial review, this time of *Decisions Nos. 512/06 and 512/06R*. Factums were filed by the worker, the employer, and the Attorney General, as well as by two interveners: the Industrial Accident Victims Group of Ontario (IAVGO), and the Schedule 2 Employer's Group. The judicial review was heard on December 1, 2014 by Marrocco ACJ, Nordheimer, and Horkins JJ.

The Divisional Court unanimously dismissed the judicial review. In the decision dated December 17, 2014, the Court agreed with the majority of the Tribunal that the WSIA is not a social benefits scheme. The Court also found the two year limit on LOE benefits in s.43(1)(c) was not discriminatory and not contrary to s.15(1) of the Charter. Benefits were not denied to workers because of a stereotypical attitude, but because of the evidence before the Tribunal that 90% of workers retire by age 65, and 90% of injured workers over 61 recover within two years.

As the Court noted, if the WSIA provided that injured workers were to receive LOE benefits until they died, that would imply people would work until they die. "Both intuitively and statistically this seems incorrect."

The Court said that even if they were wrong about that, s.43(1)(c) was saved by s.1 of the Charter. This was because it accepted the majority's finding that any limitation on rights here was justified by a pressing and substantial objective of paying LOE for wage loss resulting from injury, in a financially responsible way. Not paying benefits past the age workers would likely have retired was in accordance with this objective.

Referring again to the evidence before the Tribunal that 90% of workers retire by age 65, and 90% of injured workers over 61 recover within two years, the Court agreed that s.43(1)(c) minimally impairs entitlement for injured workers over age 65.

The Court was not persuaded that it should follow more generous approaches in other provinces, because Ontario is entitled to deference on how it wants to compensate injured workers.

Although the standard of review for WSIAT decisions on constitutional questions is correctness, the Court affirmed that it will give deference to WSIAT Charter decisions on underlying matters, such as the nature of the workers' compensation scheme, the balancing of competing interests, and the purpose of its home statute.

2. *Decision No. 1032/08* (June 27, 2012)

The worker appealed to the Tribunal for initial entitlement for a 1986 injury to his face, additional entitlement for his right shoulder which the worker related to a 2004 injury to his right elbow, and LOE benefits after September 28, 2005.

The Panel allowed initial entitlement for the scar on the worker's face. However, as it was not substantial or cosmetically offensive, the Panel found there was no eligibility for compensation. The Panel also denied entitlement for the worker's shoulder condition, as it was not caused by work or the elbow injury. The Panel confirmed the termination of LOE benefits as of September 28, 2005.

In May 2014, the worker commenced an application for judicial review. The main issue related to whether the worker's shoulder pain was related to an elbow injury. The worker had counsel at the Tribunal hearing, but was self-represented on his application for judicial review. Attempts to resolve issues relating to new materials the worker filed on judicial review were not successful.

The Tribunal filed its factum, in which it raised the timeliness of the worker's judicial review application, and challenged the worker's new materials.

The judicial review was heard in Sudbury in October 2014, before the Panel of Marrocco ACJSCO, Corbett, and Horkins JJ. The Court's decision, released on October 27, 2010, unanimously dismissed the judicial review. The Court found that although the Tribunal's arguments on timeliness and the worker's new materials had "considerable merit," ..."we prefer to rest our decision on the merits of the application rather than these preliminary issues."

Referring to the Tribunal's weighing of the medical evidence, the Court stated:

> This kind of determination lies at the very core of the Tribunal's mandate and competence. It is a finding of fact made on the basis of a detailed review and weighing of the evidence. The Tribunal made no error of law in arriving at this conclusion. And while there

is evidence on both sides of the question, the Tribunal's conclusion cannot be said to have been made without evidence or as a result of a fundamental mischaracterization of the evidence. We are not entitled to substitute our view of the evidence for that of the Tribunal, even if we consider that we might have come to a different conclusion.

3. *Decisions Nos. 959/13* (June 13, 2013) and *959/13R* (October 31, 2013)

The worker's appeal for entitlement for non-economic loss (NEL) benefits for his low back, and to LOE benefits from August 17, 2010, was denied by the Tribunal Panel.

The worker was a foreman with a paving company who injured his back at work in April 2009. The Panel found that the worker's compensable condition resolved by the time the WSIB terminated LOE benefits in 2010, as the worker's non-compensable factors were responsible for his complaints. Further, the Panel found the worker had been offered suitable work at no wage loss.

The worker's application for reconsideration was denied. In the reconsideration decision, the same Vice-Chair clarified that there had been no ruling on the worker's potential psychological entitlement, so there was nothing that would preclude the worker from pursuing entitlement at the WSIB pursuant to the Chronic Pain or Psychotraumatic policies.

In December 2013, the worker commenced an application for judicial review. Counsel for the worker and the Tribunal have agreed the judicial review will not proceed until the worker has obtained a ruling on psychological/chronic pain entitlement from the WSIB.

4. *Decision No. 1357/13* (September 12, 2013)

A family services worker became upset when she received a telephone call advising her of the death of a three year old client. The worker had an emotional reaction to the news and claimed she was unable to return to work. The Board denied entitlement for traumatic mental stress. The worker appealed to the Tribunal.

The Panel found the worker was entitled to benefits for traumatic mental stress, as she had suffered an acute reaction to a sudden and unexpected traumatic event while she was in the course of employment. Further, the way the worker learned of the death (through a phone call) exacerbated the shock. The worker was also concerned about her potential personal liability. Eventually, she was unable to continue working in her job.

The Panel applied Board policy and found the triggering event was identifiable, objectively traumatic, and unexpected in the normal course of employment. The Panel also found the worker's acute reaction led to a psychological injury, causing the worker's loss of earnings. The Panel directed the Board to assess the worker's entitlement to benefits.

In March 2014, the employer commenced an application for judicial review. The Tribunal has filed its responding factum. The judicial review is scheduled to be heard in March 2015.

5. *Decisions Nos. 1135/12* (May 9, 2013) and *1135/13R* (December 16, 2013)

An apprentice who worked for an auto repair shop helped his employer deliver a derelict vehicle to a recycling/scrap dealer. This worker steered the vehicle down a public street while being pushed from behind by his employer's vehicle. Once they arrived at the scrap yard, the worker remained in the derelict vehicle while a bobcat pushed it on to a weigh scale. Due to a failure to communicate, when the bobcat pushed the vehicle off the scale it was immediately crushed by a crane while the worker was still inside. The worker suffered serious injuries.

The worker commenced an action against the scrap yard, and three employees of the scrap yard. These defendants then commenced a third party action against the worker's employer.

The worker received statutory accident benefits (SABs). The insurance company which provided these benefits, and the thirds parties, applied to the Tribunal under s.31 of the WSIA for a determination of whether the worker's rights of action was taken away. The only issue was whether the worker and the three workers of the scrap yard were in the course of their employment when the accident occurred.

The Vice-Chair found on the balance of probabilities that both the worker and the defendant's employees were in the course of their employment when the accident happened. The lawsuit brought by the worker was barred by s.28 of the WSIA, and the grounds for the third party action no longer existed. Consequently, the worker was entitled to benefits from the insurance plan.

The worker commenced an application for judicial review. Following the Tribunal's request for the worker to amend his proceedings to add the Tribunal as a party, the Tribunal filed its Record of Proceedings. The Tribunal has filed its responding factum. The judicial review will be heard in April 2015.

6. *Decision No. 2214/13* (March 21, 2014)

In 1967, the worker, then employed as a police officer, suffered injuries to his upper body when he was attacked by a prisoner. He left the police force two years later. He then embarked on a career operating garages, working for a truck rental company, and as a millwright. He was involved in a motor vehicle accident in 1973, and suffered a number of work accidents including various low back injuries. The WSIB denied ongoing entitlement for the low back, and initial entitlement for the neck, shoulders and arms. The worker appealed to the Tribunal.

Due to the date of the 1967 accident, the pre-1985 Act applied to the worker's appeal.

The Panel held the worker did not have ongoing entitlement for the low back or shoulders as a result of the 1967 accident. However, the Panel found the 1967 accident caused a temporary aggravation of a pre-existing back and neck condition.

The worker, who is self-represented, has commenced an application for judicial review. The Tribunal has asked the worker to confirm whether he will be providing the transcript of the Tribunal hearing, at which time the Tribunal will file its Record of Proceedings. In June 2014, the worker asked the Tribunal to postpone its activities related to the judicial review application so that he could receive legal direction from the OWA regarding his

application. The Tribunal agreed to the worker's request and is waiting for the worker to confirm his next steps before proceeding with filing its Record of Proceedings.

7. *Decisions Nos. 1769/11* (November 17, 2011) and *1769/11R* (March 14, 2013)

The worker was employed in two jobs, one in construction and one in a night club. He was injured on the construction job. He was initially granted WSIB benefits calculated on the short-term basis of his earnings from his concurrent employment with both employers.

The worker had an inconsistent employment history. When his long-term benefits were calculated, the benefits were based on a finding that the night club job was only short-term. The worker appealed, alleging that his long-term average earnings should be the same as his short-term earnings.

The appeal was denied. The Panel examined the worker's employment history, as well as the two concurrent jobs. It found the worker's employment pattern demonstrated short-term, non-permanent employment, which included both the worker's concurrent jobs. Board policy established that it was not fair to calculate long-term earnings on the basis of non-permanent jobs. The Panel agreed with the Board that the long term earnings should be calculated on the basis of average earnings from all concurrent employment during the recalculation period.

The worker's application for reconsideration was dismissed by a different Vice-Chair.

In November 2014, the worker commenced an application for judicial review. It is not clear why there was a delay of almost three years in commencing the judicial review application. The Tribunal is waiting for the Applicant to order the transcript of the Tribunal hearing, following which the Tribunal will file the Record of Proceedings.

8. *Decision No. 398/14* (March 11, 2014)

B was a passenger in a car driven by P, his co-worker. B was injured when P's car went off the road. B applied for, and received statutory accident benefits. The insurer of the driver of the car applied to WSIAT for an order that B's right of action was taken away.

Both B and P had been hired to work on a construction project at a cottage in a rural area. They were staying at a nearby motel, which was booked and paid for by their employer. P was paid some monies for mileage by the employer for the use of his car. Both B and P were given a per diem for food and other expenses while working remotely. While working at the cottage, they drove to a restaurant, located in the town closest to their worksite, for their lunch break. The accident occurred after lunch, on the way back to the worksite. The main issue was whether B and P were in the course of employment at the time of accident.

The Vice-Chair characterized the issue as whether B was involved in an activity that was reasonably incidental to employment at the time of the accident. He reviewed Board policy, and noted that although the general rule was that a person is not in the course of employment after leaving the worksite, there was an exception for workers travelling on their employer's business and who must stay overnight at a motel paid for by their employer.

Further, although a worker is often not in the course of employment during a lunch break, Tribunal decisions have taken a broader approach to what is reasonably incidental when travelling workers are staying overnight at accommodations paid for by their employer. Lunch breaks in this situation have been viewed to be reasonably incidental to employment.

The Vice-Chair noted that a worker can still take themselves out of the course of employment if he or she was engaged in a personal activity at the time of the accident that was not connected to his employment. The Vice-Chair found that in this case there was no personal activity other than going to lunch. The workers had eaten at the closest and only restaurant in the area. After lunch, the two workers proceeded directly back towards the worksite.

The Vice-Chair found that B's right of action was taken away.

In September 2014, B commenced an application for judicial review. There is an issue about whether all the appropriate parties have been named in the style of cause. Once this is resolved the Tribunal will file its factum.

9. *Decisions Nos. 2175/10* (November 9, 2010) and *2175/10R* (July 5, 2011)

The worker appealed for initial entitlement for specific injuries to both knees. The employer claimed the worker had knee problems when the worker was hired, that the worker did not report the injury, and that his knee problems were not related to work. After hearing testimony from a number of witnesses and reviewing the medical evidence, the Vice-Chair denied the appeal. She found significant discrepancies about the date of the accident, whether the accident was reported, and the nature of the injuries.

The worker commenced an application for judicial review. The worker filed an affidavit with his factum, to which the Tribunal objected. The judicial review was scheduled to be heard on February 28, 2013.

However, following discussions with the worker's counsel, the judicial review was adjourned *sine die* on consent. *Decision No. 2175/10* explicitly made a finding based only on whether there was entitlement on the basis of a "chance event." The worker returned to the Board for a decision on whether there was entitlement on the basis of "disablement."

The Board denied entitlement for disablement. The worker appealed this issue to the Tribunal. It was heard on November 13, 2014, and at the end of 2014, the decision was pending. If the worker is satisfied with the ruling of the Tribunal on the issue of disablement, the judicial review will be abandoned. If the worker is not satisfied, the judicial review will proceed on both the issue of chance event and disablement.

Action in Superior Court - *Decisions Nos. 691/05* (February 11, 2008) and *691/05R* (June 13, 2013)

Following four days of hearing, the Panel allowed this self-represented worker's appeal in part. The worker was granted initial entitlement to benefits for his neck, and for various periods of temporary partial disability benefits. He was denied initial entitlement for an injury to his upper and mid-back; for a permanent impairment for his upper, mid-back and neck; for labour market re-entry (LMR); and for reimbursement of travel expenses. The WSIB's determination of the

worker's future economic loss (FEL) and his supplemental employee benefits (SEB) were found to be correct.

In July 2013, the Tribunal and the Board were served with a Notice of Application, issued out of the Superior Court of Justice, asking that *Decisions Nos. 691/05* and *691/05R* be set aside. The Tribunal wrote to the worker to advise that he had clearly commenced proceedings in the wrong court. The Tribunal informed the worker that if he wanted to challenge the Tribunal's decisions, he was required to bring an application for judicial review in the Divisional Court. The Tribunal further advised the worker that if he did not immediately file a Notice of Abandonment, the Tribunal would bring a motion to dismiss the application.

The worker abandoned his action in August 2013.

In February 2014, the worker commenced a new action against the WSIB and the Tribunal, this time claiming relief of over six million dollars. Much of the claim contains allegations against the WSIB, but the claim also takes issue with the Tribunal's decisions, alleging errors and bad faith. It alleged the worker had been threatened by one of the Panel members. The worker also served the Tribunal with what appears to be a surreptitious recording.

The Tribunal and the Board each brought a motion to dismiss the worker's action. The motions were scheduled for October 22, 2014. The worker subsequently advised that he wanted to adjourn the motions. The motions are now scheduled to be heard on February 23, 2015.

Recent Decisions

100% NEL awards

Decision No. 51/14 considered the appeal of the estate of a worker seeking a 100% NEL award on the basis that the worker's asbestosis condition arising from his employment led to his death. The Board provided written submissions explaining its practice of awarding 100% NEL awards.

Historically, such awards are awarded in cases involving terminal illness, or where the compensable condition was the primary cause of the worker's death. In either case, if the death was found to be compensable, a 100% NEL award would be granted. If, however, the compensable condition was a contributing factor but not the primary cause of death, the rating of the impairment would be apportioned based on the medical significance of the compensable condition and its relative contribution to the worker's death.

The Tribunal Panel adopted this Board practice in rendering its decision, noting that prior Tribunal decisions have found that this approach may not be appropriate in situations of traumatic injury which leads to death (*Decisions Nos. 2424/07* and *2497/08*). In this appeal, the Panel found that there were other noncompensable conditions which contributed significantly to the worker's death alongside the compensable asbestosis. It, therefore, adopted the Board's approach to apportion the impairment rating based on the medical significance of the compensable condition and its relative contribution to the worker's death and awarded a 50% NEL award.

Occupational stress

Decision No. 2046/13 considered a claim for occupational stress from a dispatcher of 911 emergency calls. While at work, another dispatcher received a call respecting the 3 year old daughter of the claimant who fell in a covered pool at home. The claimant felt that her co-workers mishandled this call. The claimant continued working for about 10 months, when she took a 911 call that caused her to have flashbacks about the prior incident respecting her daughter. Subsequently, she stopped working.

The Tribunal Panel found that the worker's employment did not make a significant contribution to the stress condition. The condition, overwhelmingly, was due to personal non-work-related factors, which rendered insignificant the contribution of the employment. The stressors present in this case were largely due to the worker's own misconceptions of the workplace and the incident respecting her daughter. While the worker focused on perceived inadequacies of co-workers handling 911 calls, these beliefs were unfounded. The claimant's fixation on the stressors relating to the 911 calls arose from a personal traumatic event and not the events at the workplace. Also, while the claimant alleged that she was working in a poisoned work environment, the Panel found that this was largely due to misperceptions of events and/or employment decisions or actions, excluded from WSIA entitlement.

Weighing medical evidence

Decision No. 1624/14 involved an appeal by a letter carrier for entitlement for tarsal tunnel syndrome which he claimed arose from a change in his mail delivery route. The Panel, in considering the conflicting medical evidence filed in the appeal, referred to prior Tribunal decisions (*Decisions Nos. 558/02*, *1577/97*, *1841/00R*, *1758/04*, *484/88*, and *2469/06*) as well as the court decision, *Bedford v. Canada (Attorney General)* (2010 ONSC 4264) (varied 2012 ONCA 186, 2013 SCC 72), in discussing approaches to weighing medical evidence in an appeal.

The Panel set out a number of factors to be taken into account in weighing medical evidence. These included: (1) the credentials of the practitioner who authored the report including qualifications and level of expertise; (2) the quality of the medical reporting in terms of its detail and sufficiency of explanation for the conclusions reached; (3) the accuracy of the knowledge of the facts, as set out in the reporting; (3) the responsiveness of the medical reporting (i.e. has the practitioner answered the questions asked?, does the report directly address the issue(s) on appeal?); (4) objectivity of the findings of the report (as opposed to a reporting of the subjective complaints); (5) the opportunity for the practitioner to examine the worker and for how long; (6) the contemporaneity of the reporting with the events in question in the report; (7) the consistency of the reporting with other reporting of the same practitioner and/or other medical reporting on file; (8) the neutrality of the report (i.e. any indication of advocacy on behalf of the worker).

Substantial connection with Ontario

Decision No. 1770/14 found no substantial connection with Ontario for the purposes of coverage under WSIA, where the plaintiff was only scheduled to be in Ontario for a few days. This was consistent both with the law on substantial connection and Board policy.

The plaintiff was an employee of an American automobile manufacturer who lived in the United States, had workers' compensation coverage there, and was a member of an American union. She was sent to a plant in Ontario owned by the manufacturer for a period of three days to

watch the production process in order to try to identify a problem. She had been in Ontario for about 24 hours when she was involved in a motor vehicle accident.

The Vice-Chair, referring to *Decision No. 334/07*, noted that there may be some circumstances where the worker's connection to Ontario might be considered borderline and where the level of the employer's activity within the province might make a difference when determining whether the worker's employment had a substantial connection to Ontario. The Vice-Chair also noted *Decisions Nos. 1863/00* and *645/95*, which considered the specific activity of an individual in Ontario and whether they were participating in the commerce of the province.

The Vice-Chair found that in the circumstances of this case, the level of the plaintiff's employer's business activity in Ontario did not make a difference in determining the worker's employment connection to Ontario. He also noted that any amount of direct work in Ontario by a non-resident worker for a non-resident employer would not necessarily result in there being a substantial connection with Ontario. The duration of that work in Ontario would still have to be taken into consideration. Other Tribunal decisions which found substantial connection involved parties that spent much more time in Ontario and on a regular basis than the plaintiff in this right to sue application.

Health care

Decision No. 1527/14 found that costs for make-up were not covered under the health care benefits provided under WSIA and Board policy. In this case the worker had received a 10% NEL award for a facial disfigurement. She was seeking health care benefits in the form of coverage for the costs of cosmetics she was using to hide the disfigurement.

The Vice-Chair noted that S.33(1) of the WSIA provides that workers are entitled to health care benefits as may be "necessary, appropriate and sufficient" as a result of a compensable injury. OPM Document No. 17-01-02 sets out a list of allowable health care benefits. The cost of make-up, however, is not included in the list of health care benefits set out in this policy. The only other provision of health care benefits that might be considered in the policy therefore related to "such measures to improve the quality of life of severely impaired workers as, in the WSIB's opinion, are appropriate."

As the worker was only receiving a 10% NEL award for the disfigurement, she was not covered under the Board policy respecting "severely impaired workers" found at OPM Document No. 17-06-02, which defines such a worker as one who is in receipt of a NEL award of at least 60%. Furthermore, the cosmetics were not found to be "necessary" in the circumstances.